

Local Prejudice in Criminal Cases

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Act.⁸⁶ Insofar as the law forces the Commission to try to apply to the whole business organization of the country standards that are in themselves vague and conflicting and forces it to expend energy in the determination of cost questions whose economic significance may be doubted, it probably cannot improve the quality of the Commission's work. But to the extent that it has contributed to the various improvements noted above, the Act must be conceded to have had a beneficial effect. The Commission has acquired influence; as an administrative body it has produced better work⁸⁷ and received the needed stimulus of complete approval by the courts.

In comparison with the rise of the ICC after the Hepburn Act,⁸⁸ this is a very modest achievement. But the FTC has so much larger and more difficult a field that it can hardly assume the degree of responsibility exercised by the ICC.⁸⁹ And as long as it retains its present organization and functions, more limited achievements must be expected. But the experience and self-confidence gained from the new activity stimulated by the Robinson-Patman Act can be of value in administering any further acts or amendments that may give the Commission tools of better design.⁹⁰

LOCAL PREJUDICE IN CRIMINAL CASES.— Ordinarily a crime must be tried in the county in which it is alleged to have been committed.¹ But in individual cases it may be undesirable that the trial be held in a particular county because there is a possibility that prejudice of one sort or another will render the trial unfair to either the defendant or the prosecution. This prejudice may arise in a variety of ways. The race

⁸⁶ See authorities cited in notes 2 and 31 *supra*. Some writers, however, feel either that what the Commission can actually accomplish will be useful, or that it is possible for it to construe the Act with sufficient liberality to avoid harm. Sharp, *Discrimination and the Robinson-Patman Act* (1938) 5 U. OF CHI. L. REV. 383; George, *Business and the Robinson-Patman Act: The First Year* (1937) 4 LAW & CONTEMP. PROB. 392, 409; Evans, *Anti-Price Discrimination Act of 1936* (1936) 23 VA. L. REV. 140.

⁸⁷ "... the actual administration of paragraphs 2(a) and 2(c) ... is that of an expert and seasoned tribunal." Oppenheimer, *Foreword to Symposium*, (1940) 8 GEO. WASH. L. REV. 249, 253. Other praise of the Commission's work may be found throughout WERNE, v-xii, 122, 193-95, 247, 251 and in the authorities cited in note 2 *supra*. However, this commendation is addressed largely to the brokerage work.

⁸⁸ 34 STAT. 584 (1906); see, e.g., 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) c. 1; MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 1920-1930 (1933) c. 4.

⁸⁹ See LANDIS, THE ADMINISTRATIVE PROCESS (1938) 16, 17.

⁹⁰ Cf. Hamilton, *Cost as a Standard for Price* (1937) 4 LAW & CONTEMP. PROB. 321, 333. For suggested amendments to the Act, see McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, *id.* at 334, 352.

¹ This requirement had more significance when the "jury of the vicinage" was the source rather than the arbiter of the evidence. The modern conception that the jury is a *tabula rasa* might be better served if it were drawn from some other neighborhood. But it is necessary that venue be laid somewhere, and the probable

of the accused, the publicity accorded the crime,² economic, political and personal factors,³ or the previous history of the case⁴ may induce a portion of the community to form preconceptions as to the proper disposition of the case which will impair its ability to dispense impartial justice. This unfortunate situation can be avoided by granting a change of venue to another county within the state, or by removing the case to the federal courts, and its effects can sometimes be rectified by habeas corpus proceedings before a federal court.

The law is not uniform as to the right of the prosecution to apply for a change of venue.⁵ Although at least one state expressly denies this right by statute,⁶ and statutes giving the right to the defendant without mention of the prosecution may by implication deny it to the state,⁷ most states have statutes expressly allowing the prosecution to apply for a change.⁸ But state constitutions guaranteeing to defendants in criminal cases the right of "trial by jury of the county" where the crime was committed have been held to preclude a trial anywhere else without the defendant's consent.⁹ However, where the constitutional language

availability of witnesses at the place of commission makes that a not illogical choice. It may, however, be more convenient to try the crime elsewhere. For a discussion of when this convenience should override traditional rules as to venue, see *United States v. Parker*, 19 F. Supp. 450, 459 (D. N. J. 1937), *aff'd*, 103 F.(2d) 857 (C. C. A. 3d, 1939), *cert. denied*, 307 U. S. 642 (1939). *Cf.* REV. STAT. § 729 (1875), 28 U. S. C. § 101 (1934).

² For example, this may be occasioned by highly-colored newspaper accounts of the unsavory details of the crime, by mass meetings urging swift punishment, or by solicitation of funds to secure the criminal's apprehension and conviction, which may have the further effect of identifying contributors with the prosecution. *Quinn v. State*, 54 Okla. Cr. 179, 16 P.(2d) 591 (1932) (horror stories in newspaper); *Parker v. State*, 111 Tex. Cr. 140, 12 S. W.(2d) 213 (1928) (mass meeting, and fund to which the Ku Klux Klan contributed).

³ The case may be made a campaign issue. *Cf.* *Haddock v. State*, 141 Fla. 132, 192 So. 802 (1939). Or a public figure may be accused of embezzling funds belonging to the community or to a considerable portion of its members. *Pope v. State*, 126 Tex. Cr. 35, 70 S. W.(2d) 193 (1934) (city official); *Baxter v. State*, 91 Ohio St. 167, 110 N. E. 456 (1914) (banker). Or either the accused or the victim may have many relatives in the community. *Smith v. Commonwealth*, 108 Ky. 53, 55 S. W. 718 (1900) (defendant's relatives; state granted change of venue); *McRane v. State*, 194 So. 632 (Fla. 1940) (victim's relatives; accused granted change).

⁴ For example, after a finding of guilt, the case may have been remanded on an evidence point or a former indictment quashed because of exclusion of Negroes from the grand jury. *Muscoe v. Commonwealth*, 87 Va. 460, 12 S. E. 790 (1891); *State v. Wainwright*, 119 W. Va. 34, 192 S. E. 121 (1937). A similar prejudice might arise because of the prior trial of an accomplice.

⁵ See Note (1932) 76 A. L. R. 1034; *Legis.* (1932) 17 IOWA L. REV. 399; (1937) 25 GEO. L. J. 1036.

⁶ Pa. Laws Spec. Sess. 1938, No. 43, (1939) 52 HARV. L. REV. 1023.

⁷ ILL. ANN. STAT. (Smith-Hurd, 1936) c. 146, § 18. *Accord*, ALA. CONST. Art. I, § 6. See (1939) 52 HARV. L. REV. 1023.

⁸ *E.g.*, FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 8406; IDAHO CODE ANN. (1932) § 19-1708; IOWA CODE (Reichman, 1939) § 13810; MINN. STAT. (Mason, 1927) § 10704. *Accord*, MONT. CONST. Art. III, § 16.

⁹ *E.g.*, *Ex parte Rivers*, 40 Ala. 712 (1867); *Osborn v. State*, 24 Ark. 629 (1867); *Wheeler v. State*, 24 Wis. 52 (1869); *State v. Greer*, 22 W. Va. 800 (1883). *Contra*: *Hewitt v. State*, 43 Fla. 194, 30 So. 795 (1901); *State v. Holloway*, 19 N. M. 528, 146 Pac. 1066 (1914).

is less restricted and requires a jury of the "vicinage" or "country" or simply "trial by jury," the state has been allowed to change.¹⁰ It would seem that the state, as well as the accused, should be guaranteed a fair trial. The objection that to grant a change of venue to the prosecution may make it difficult for an impecunious defendant to transport his witnesses to the new place of trial has been met in New York by requiring the state to bear additional costs resulting from the change.¹¹ The burden of persuasion is customarily on the movant, but the court should be particularly circumspect as to a motion by the prosecution because *prima facie* the accused is entitled to trial in the county where the crime was allegedly committed. And if the change is granted, the court should be satisfied that the new county is not prejudiced against the defendant in any way.¹²

More often it is the defendant who seeks to have the trial held in another county. While the prescribed procedure varies considerably from state to state, there are certain hurdles that the movant is generally required to clear. He must make application for a change of venue to the trial judge and give notice to the prosecution within a certain time before trial or after indictment.¹³ While it is true that the state should be given notice that a change is sought, courts have been overzealous in refusing to entertain unseasonably filed applications. This has often worked substantial injustice upon a defendant, who, perhaps because of the very prejudice that should warrant a change, has not had the aid of counsel until shortly before trial.¹⁴

The movant must accompany his application with affidavits by a number of "credible persons" or "housekeepers" of the county.¹⁵ If "credible" means merely competent to be a witness, and if he need swear only that he believes prejudice to exist,¹⁶ this requirement creates little hardship; but it has been held to necessitate a person whose knowledge of the tenor of feeling throughout the county enables him sweepingly to affirm that the accused cannot get a fair trial.¹⁷ And the prejudice against the defendant may be so great that he is unable to

¹⁰ *People v. Webb*, 1 Hill 179 (N. Y. 1841); *McMillan v. State*, 68 Md. 307, 12 Atl. 8 (1887); *People v. Peterson*, 93 Mich. 27, 52 N. W. 1039 (1892); *Commonwealth v. Hargis*, 237 Ky. 591, 36 S. W.(2d) 8 (1931). *Contra*: *People v. Powell*, 87 Cal. 348, 25 Pac. 481 (1891).

¹¹ *People v. Baker*, 3 Abb. Pr. 42 (N. Y. 1856).

¹² *Cf. Smith v. Commonwealth*, 108 Ky. 53, 55 S. W. 718 (1900).

¹³ See, e.g., ILL. ANN. STAT. (Smith-Hurd, 1936) c. 146, § 24.

¹⁴ *Cf. Avery v. Alabama*, 308 U. S. 444 (1940) (counsel appointed three days before trial); *Downer v. Dunaway*, 53 F.(2d) 586 (C. C. A. 5th, 1931) (counsel appointed one hour before trial). Even if counsel is seasonably appointed, he may have neither the ability nor the interest to take timely advantage of procedural opportunities or to avoid technical pitfalls.

¹⁵ See, e.g., TEX. ANN. CODE CRIM. PROC. (Vernon, 1925) art. 562; KY. STAT. ANN. (Carroll, 1936) § 1096.

¹⁶ *Freleigh v. State*, 8 Mo. 606 (1844). In most cases this seems to have been tacitly assumed.

¹⁷ *Duckworth v. State*, 86 Ark. 357, 111 S. W. 268 (1908); *Tillman v. State*, 121 Ark. 322, 181 S. W. 890 (1915).

find the requisite number of persons who will swear to it.¹⁸ Further difficulty may arise from the fact that the state is generally allowed to interpose counter-affidavits.¹⁹ Courts have been lax in requiring that these affiants be disinterested parties.²⁰ And the prosecution may round up such a horde of persons willing to swear to the absence of prejudice that the court is overwhelmed by mere pressure of numbers.²¹

If the affidavits of the defendant are not controverted he will probably be granted a change of venue.²² But if the prosecution resists the change, it will be necessary to hold a hearing at which oral testimony will be taken. It is agreed that the burden of proof is on the movant,²³ but a variety of rules have been laid down as to what he must establish. On one extreme is the requirement in Georgia that the accused show that there is a "probability or danger of lynching."²⁴ In Texas it is said that he must demonstrate that it is "improbable" that he will receive a fair trial.²⁵ In Illinois he need only show that there is "reason for fear" of this treatment.²⁶ The most liberal test is that used in New York where it is sufficient to demonstrate "a strong probability that bias exists in the community."²⁷ It will be noted that this progression is somewhat geographical. Although it has been required that the trial judge decide this issue solely on the evidence before him,²⁸ most states allow him to

¹⁸ *Fitzgerald v. Commonwealth*, 30 Ky. L. 349, 98 S. W. 319 (1906). Here, although the court accepted the defendant's allegation that a county-wide fear of reprisals had prevented him from obtaining two "housekeepers" as affiants, it refused to change the venue because there was not literal compliance with the statute. For the same court in a different mood, see *Browder v. Commonwealth*, 136 Ky. 45, 123 S. W. 328 (1909).

¹⁹ See, e.g., ILL. ANN. STAT. (Smith-Hurd, 1936) c. 146, § 22.

²⁰ An extreme example of this practice is found in *People v. Hall*, 220 Cal. 166, 30 P.(2d) 23 (1934), where the opposing affidavits relied on were those of the district attorney and the sheriff. The upper court commended the refusal to change, saying that these two persons had exceptional opportunities for wide observation of the county.

²¹ Also the very number of opposing affidavits may indicate prejudice. *Jamison v. People*, 145 Ill. 357, 34 N. E. 486 (1893) (357 opposing affidavits); *State v. Weems*, 96 Iowa 426, 65 N. W. 387 (1895) (295 counter-affidavits interposed to a claim of mob domination).

²² *State v. Mooney*, 10 Iowa 506 (1860); *Miller v. Commonwealth*, 248 Ky. 717, 59 S. W.(2d) 969 (1933).

²³ *State v. Palko*, 122 Conn. 529, 191 Atl. 320 (1937), *aff'd*, 302 U. S. 319 (1937); *Maxwell v. Commonwealth*, 169 Va. 886, 193 S. E. 507 (1937). Some courts say that there is a "presumption" that the accused can get a fair trial. See *Johnson v. State*, 1 Okla. Cr. 321, 339, 97 Pac. 1059, 1066 (1908); *Welch v. State*, 28 Ala. App. 273, 276, 183 So. 879, 882 (1938).

²⁴ *Goumas v. State*, 44 Ga. App. 210, 160 S. E. 682 (1931); *Butler v. State*, 56 Ga. App. 126, 192 S. E. 238 (1937). The statute does not require this result. GA. CODE ANN. (Park, et al., 1936) tit. 27, § 1201. And even where by ordinary standards the danger of lynching seems quite sizeable, a Georgia court may refuse a change of venue. *James v. State*, 178 Ga. 761, 174 S. E. 237 (1934) (65 armed men required to guard the accused).

²⁵ *Pope v. State*, 126 Tex. Cr. 35, 39, 70 S. W.(2d) 193, 195 (1934).

²⁶ *People v. Anderson*, 350 Ill. 603, 606, 183 N. E. 588, 589 (1932).

²⁷ *People v. Nathan*, 139 Misc. 345, 346, 249 N. Y. Supp. 395, 397 (Sup. Ct. 1931).

²⁸ *State v. Mooney*, 10 Iowa 506 (1860).

act on his own knowledge.²⁹ It would seem that this knowledge should be a factor only in the granting and not in the denying of a change of venue; he often can sense the existence of prejudice, but he seldom can be sure of its absence. Furthermore, if his own knowledge can be an element in refusing a change, it will be difficult for an appellate court to reverse such a refusal, because it cannot tell from the record how large a part this knowledge played in his decision.

When the trial court denies the change of venue there seems to be no right to an immediate appeal from this decision. The case will proceed to trial and in the event of a conviction, the defendant may raise this question before the upper court along with other alleged errors. But since the granting of a change rests in the discretion of the trial court,³⁰ the appellate court will not order a change unless it is convinced that this discretion has been abused. Aside from its usual reluctance to make such a finding, the court will be confronted with the *fait accompli* of the conviction, which, although theoretically immaterial when ascertaining the existence of prejudice, is likely to be influential on this question. Furthermore, it may be necessary for the defendant to convince the court, not merely that when the proceedings began it was improbable that he would receive a fair trial, but rather that he did not actually receive such a trial.³¹ But assuming that the court is able to overcome these psychological difficulties and finds that it was error to deny the change, the usual practice has been to remand the case to the same court for a rehearing. It would seem that where the prejudice is clearly still existent in that community, the appellate court should be able to send the case directly to an unbiased community.

When the trial court grants the change, or when the appellate court orders it to do so, the question remains as to where the case will be sent. Usually this is left to the discretion of the trial judge,³² though some states require the nearest county without prejudice,³³ and others a county within a limited contiguous area.³⁴ The latter requirement seems unfortunate because prejudice seldom respects political subdivisions. Most states allow only one change of venue.³⁵ This rule seems

²⁹ *Conrad v. State*, 144 Ind. 290, 43 N. E. 221 (1895); *People v. Swift*, 172 Mich. 473, 138 N. W. 662 (1912).

³⁰ *Stroud v. United States*, 251 U. S. 15 (1919); *Power v. People*, 17 Colo. 178, 28 Pac. 1121 (1892); *Stroud v. Commonwealth*, 160 Ky. 503, 169 S. W. 1021 (1914); *James v. State*, 178 Ga. 761, 174 S. E. 237 (1934).

³¹ The fact that a jury was obtained has been held to indicate that the prejudice was not sufficient to prevent a fair trial. *People v. Anderson*, 350 Ill. 603, 183 N. E. 588 (1932); *Haddock v. State*, 141 Fla. 132, 192 So. 802 (1939). But elements of force or feeling may influence a jury subconsciously, and "cases some times arise . . . [where] it is as essential to change the theater of trial as to have a jury filling the requirements of the law." *Jones v. Commonwealth*, 111 Va. 862, 866, 69 S. E. 953, 955 (1911).

³² *Zinn v. District Court*, 17 N. D. 135, 114 N. W. 472 (1908); *Commonwealth v. Kelly*, 266 Ky. 662, 99 S. W.(2d) 774 (1936).

³³ See, e.g., ILL. ANN. STAT. (Smith-Hurd, 1936) c. 146, § 19.

³⁴ See, e.g., N. M. STAT. ANN. (Courtwright, 1929) § 147-108.

³⁵ *Duggins v. State*, 66 Ind. 350 (1879); *Lee v. State*, 164 Md. 550, 165 Atl. 614

unnecessarily rigid; where it is in force, courts should be particularly careful that a county prejudiced to neither side is selected.³⁶

It is apparent that the existing machinery for changing the venue of a criminal trial does not ensure impartial justice. A step in the right direction has been taken in a few states where it is required that a requested change be granted automatically in capital cases.³⁷ The additional expense and the possibility that this privilege will be used as a dilatory tactic seem to be outweighed by the added assurance that one whose life is at stake will be given a fair trial. Similar considerations might justify extension of this requirement to felonies punishable by long prison sentences.³⁸ Another desirable safeguard is the vesting of power in the trial judge to order a change on his own motion, without the concurrence of either counsel.³⁹ This power should be liberally exercised to rectify the omissions of incompetent counsel. Whether a statute is needed to authorize this practice would seem to depend upon whether power to change venue is derived from statute or common law. The few cases that have sustained the common-law origin of the power⁴⁰ have not made it clear whether it is a right of the courts to keep their proceedings untainted by prejudice, a right of the party to be tried in an atmosphere free of bias, or both. It would seem, however, that in these states, statutes specifying how venue can be changed should be regarded as codifications rather than sources of the power to change,⁴¹ and that the courts should not be astute to deny changes because of technicalities. And although the question has received surprisingly little judicial discussion, it would seem that denial of a change in certain cases is in effect a denial of the right to trial by jury as guaranteed by state constitutions.⁴²

While the responsibility should be on the states to ensure fair trials

(1933), *cert. denied*, 290 U. S. 639 (1933). In *Dietz v. State*, 149 Wis. 462, 136 N. W. 166 (1912), the substitution of a different judge was held to be the one change of venue permitted by statute. *State v. Minski*, 7 Iowa 336 (1858), reached the result that, while there could be only one change in the district courts, there could be any number in the justice courts.

³⁶ *Smith v. Commonwealth*, 108 Ky. 53, 55 S. W. 718 (1900).

³⁷ MD. CONST. ART. IV, § 8; IND. STAT. ANN. (Burns, 1933) § 9-1305. MO. STAT. ANN. (1932) p. 3194, § 3630, grants change as a matter of right when the forum is in a county of less than 75,000 population.

³⁸ Such long term offenses are more likely to be crimes calling forth prejudice. The same result might be reached by enumerating crimes which lead to bias, but this allows room for legislative inaction when new crimes become important.

³⁹ *Parrish v. State*, 134 Tex. Cr. 545, 116 S. W.(2d) 706 (1938). In *Downer v. Dunaway*, 53 F.(2d) 586, 589 (C. C. A. 5th, 1931), it was said that it was the duty of the state judge to grant the change of venue on his own motion in accord with GA. CODE ANN. (Park, et al., 1936) tit. 27, § 1201. See note 24 *supra*.

⁴⁰ *Cochecho R. R. v. Farrington*, 26 N. H. 428 (1853); *Jones v. People*, 79 N. Y. 45 (1879); *Commonwealth v. Balph*, 111 Pa. 365, 3 Atl. 220 (1886); *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N. E. 369 (1911).

⁴¹ *People v. Peterson*, 93 Mich. 27, 30, 52 N. W. 1039, 1040 (1892).

⁴² Some state constitutions require an "impartial" trial by jury. E.g., ALA. CONST., ART. I, § 6. The absence of this adjective, however, seems immaterial, for a requirement of impartiality should be inferred, particularly in view of the due process clauses in many state constitutions.

to defendants in their courts, resort to the federal courts may both prevent injustice in individual cases and spur the states to set their own houses in order. Where the highest court of the state has affirmed a conviction allegedly surrounded with prejudice, appeal may be had to the United States Supreme Court on the ground the defendant has been denied the due process of the law required by the Fourteenth Amendment. Alternatively a writ of habeas corpus might be sought from a federal district court.⁴³ Although it was held in *Moore v. Dempsey* that the Fourteenth Amendment renders a mob-dominated trial void,⁴⁴ it is not clear whether prejudice of less tangible nature has a similar effect. The increasing willingness of the Supreme Court to pass judgment upon the internal workings of state tribunals⁴⁵ as they affect civil liberties may presage a broadening of the holding of *Moore v. Dempsey*.

If the case has not yet gone to trial, a defendant who fears that local prejudice may preclude a fair trial may be able to have the case removed to a federal court. Congress has provided for such removal when "any prosecution is commenced in any State court . . . against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any rights secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States. . . ." ⁴⁶ Enacted in 1866 to supplement the Fourteenth Amendment, this statute has been seldom invoked because of the narrow construction put upon it. It was originally construed to give, as it was clearly intended, a right to removal because of local prejudice.⁴⁷ But the Supreme Court subsequently held it to apply only to cases where the defendant was unable to enforce his civil rights because of a state statute, and not where this was prevented by isolated judicial action.⁴⁸ It would seem that where a change of venue is denied

⁴³ REV. STAT. § 751 (1875), 28 U. S. C. § 451 (1934); REV. STAT. § 755 (1875), 28 U. S. C. § 453 (1934). This has the advantage over an appeal in that the federal courts will reexamine the facts more closely. Cf. *Johnson v. Zerbst*, 304 U. S. 458 (1938). But this writ is discretionary. *Ex parte Royall*, 117 U. S. 241 (1886). And it is said to be necessary for the petitioner to have exhausted his remedies in the state courts. See *Wilson v. Lanagan*, 99 F.(2d) 544, 546 (C. C. A. 1st, 1938), *cert. denied*, 306 U. S. 634 (1939); cf. *Mooney v. Holahan*, 294 U. S. 103 (1935). But this is not a necessary result from the terms of the statute, and it has been persuasively argued that the writ should be available at any stage of the state proceeding. See Jefferson, *Race Discrimination in Jury Service* (1939) 19 B. U. L. REV. 413, 446. *But cf.* Note (1923) 37 HARV. L. REV. 247.

⁴⁴ 261 U. S. 86 (1923). *But cf.* *Frank v. Mangum*, 237 U. S. 309 (1914).

⁴⁵ *E.g.*, *Hale v. Kentucky*, 303 U. S. 613 (1938); *Pierre v. Louisiana*, 306 U. S. 354 (1939); *Smith v. Texas*, 61 Sup. Ct. 164 (U. S. Nov. 25, 1940).

⁴⁶ REV. STAT. § 641 (1875), 28 U. S. C. § 74 (1934).

⁴⁷ *State v. Dunlap*, 65 N. C. 491 (1871). *Contra*: *Texas v. Gaines*, 23 Fed. Cas. 869, No. 13,847 (C. C. W. D. Tex. 1874).

⁴⁸ *Virginia v. Rives*, 100 U. S. 313 (1879); *Bush v. Kentucky*, 107 U. S. 110 (1882); *Gibson v. Mississippi*, 162 U. S. 565 (1896); *Kentucky v. Powers*, 201 U. S. 1 (1906). Local prejudice has been expressly held not to be within the statute. *California v. Chue Fan*, 42 Fed. 865 (C. C. N. D. Cal. 1890); *Lamson v. Superior Court*, 12 F. Supp. 812 (N. D. Cal. 1935).

pursuant to a statute which has been construed to allow such a change only where a danger of lynching is shown, the case should be removed even under the restricted interpretation of the removal statute.⁴⁹ But ordinarily the injustice arises not from the wording or construction of a statute but from judicial refusal to recognize the existence of prejudice. The reference in the removal statute to a defendant's inability to enforce his rights "in the part of the State where such suit or prosecution is pending" seems to be directed solely at local prejudice. Furthermore, the Fourteenth Amendment protects the individual from judicial or administrative as well as legislative action.⁵⁰ Although there has been a recent tendency to restrict the jurisdiction of the federal district courts,⁵¹ it may not be oversanguine to expect that the present Supreme Court, in view of its concern with civil liberties, will restore the removal statute to its original function.

RECENT CASES

ADMINISTRATIVE LAW — CIVIL SERVICE — BOARD'S ERROR IN CERTIFYING ELIGIBILITY HELD NO GROUND FOR DISMISSAL OF PERMANENT APPOINTEE BY SUCCEEDING BOARD. — *A* applied to the Pennsylvania Unemployment Compensation Board of Review for permission to take the civil service examination for the post of Senior Interviewer, the qualifications for which had been established by the Secretary of Labor and Industry under the Pennsylvania Unemployment Compensation Law. PA. STAT. (Purdon, Supp. 1940) tit. 43, § 768(e). After he had taken the examination, the board certified that he was eligible, and the Secretary appointed him. Following the 1938 elections, a newly appointed board ruled, after a hearing, that although *A* had truthfully stated his qualifications, the preceding board had misconstrued the Secretary's requirements, that *A* had never met those requirements, and that he must be dismissed. *A* appealed to the Pennsylvania Superior Court. *Held*, that after *A*'s appointment to a permanent position, a succeeding board, in the absence of fraud, misrepresentation, or misconduct, may not review its predecessor's certification. Reinstatement ordered. *Kassarich v. Unemployment Compensation Board of Review*, 12 A.(2d) 823 (Pa. Super. Ct. 1940). Accord, *MacDonald v. Unemployment Compensation Board of Review*, 15 A.(2d) 407 (Pa. Super. Ct. 1940).

⁴⁹ In passing on the constitutionality of a state statute, the Supreme Court will accept the interpretation given to it by the state courts. *Cf.* *Henry L. Doherty & Co. v. Goodman*, 294 U. S. 623 (1935).

⁵⁰ *Moore v. Dempsey*, 261 U. S. 86 (1923); *Smith v. Texas*, 61 Sup. Ct. 164 (U. S. Nov. 25, 1940).

⁵¹ *Cf.* *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938); see Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499, 523.